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26
27 **UNITED STATES DISTRICT COURT**
28 **CENTRAL DISTRICT OF CALIFORNIA**
WESTERN DIVISION

NATHANIEL WILSON, et al.,

Plaintiffs,

vs.

THE MILL GROUP INC., et al.,

Defendants.

CASE NO.: 2:12-CV-10214-SVW-MAN

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: April 21, 2014
Time: 1:30 P.M.
Place: Courtroom 6

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs seek an order granting final approval of the Settlement (Dkt. No. 45-02 at p. 17) in this class action lawsuit, together with an award of attorneys' fees, reimbursement of expenses and case contribution awards. Plaintiffs' operative Second Amended Complaint (Dkt. No. 25; "SAC") seeks unpaid wages and penalties arising from Defendants The Mill Group, Inc. dba The Mill's ("The Mill") and The Churchill Benefit Corporation dba Yurcor's ("Yurcor") (together, "Defendants") alleged pattern and practice of misclassifying their employees as independent contractors and making unlawful deductions from employees' wages. *See* SAC ¶4; Declaration of Stuart Libicki in Support of Plaintiffs' Motion for an Award of Attorney's Fees, Litigation Expenses, and Case Contribution Awards (Dkt. No. 46-03; "07-29-2013 Libicki Dec.") at ¶7; Declaration of Arthur Grebow in Support of Plaintiffs' Uncontested Motions for (1) Class Certification and (2) Preliminary Approval of Class Action Settlement (Dkt. No. 45-02; "Grebow Dec.") at ¶7.¹ The Court should grant final approval of the Settlement because it is fair, reasonable and adequate as required by Fed.R.Civ.P. 23(e) and the Ninth Circuit Court of Appeals. *See* Fed.R.Civ.P. 23(e) (a class action may be settled only with court approval upon a finding it is fair, reasonable and adequate); *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 963 (9th Cir. 2009). For the following reasons, the Settlement is fair, reasonable and adequate under the factors set forth by the Ninth Circuit which include: the strength of Plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the relief offered by the

¹ Much of the discussion in this brief supporting final approval of the settlement is the same as that presented to the Court in the motion for preliminary approval and supporting papers.

1 Settlement; the extent of discovery completed and the stage of the proceedings; the
2 experience and views of Class Counsel; and Settlement Class Members' reaction to
3 the Settlement. *Rodriguez*, 563 F.3d at 963.

4 **First**, the Settlement is fair, reasonable and adequate because it makes each
5 Settlement Class Member eligible to be made whole by receiving the full amount
6 Defendants unlawfully deducted from their wages, together with an additional
7 monetary penalty award of approximately \$2,600 each. Settlement at p. 12-13;
8 Grebow Dec. ¶14; 07-29-2013 Libicki Dec.¶21. Therefore, the Settlement will
9 fully compensate Settlement Class Members for their out-of-pocket losses. The
10 only further money Settlement Class Members could obtain by taking their claims
11 to trial would be additional penalties as opposed to their out-of-pocket losses.
12 Grebow Dec. ¶14; 07-29-2013 Libicki Dec.¶ 21. This shows the Settlement is fair,
13 reasonable and adequate.

14 **Second**, Settlement Class Members' reaction to the Settlement is 100%
15 positive, further demonstrating the Settlement is fair, reasonable and adequate.
16 Class Counsel notified Settlement Class Members of the Settlement via direct mail
17 and website publication pursuant to this Court's Order (Dkt. No. 50 at p. 6).
18 Declaration of Stuart Libicki in Support of Plaintiffs' Motion for Final Approval of
19 Class Action Settlement ("Libicki Dec.") ¶¶5-6; Declaration of Abel Morales in
20 Support of Plaintiffs' Motion for Final Approval of Class Action Settlement
21 ("Morales Dec.") ¶¶11-12. No Settlement Class Member objected or opted out.
22 Morales Dec. ¶¶11-12. 03-24-2013 Libicki Dec.¶8. To the contrary, many
23 Settlement Class Members expressed their satisfaction with the settlement to Class
24 Counsel. 03-24-2013 Libicki Dec.¶7.

25 **Third**, the relief obtained for Settlement Class Members is fair, reasonable
26 and adequate in light of the risks and expense of litigating this matter through class
27

1 certification, dispositive motions, trial and appeal. Because litigating this matter
2 would involve considerable risk and expense with no certainty Settlement Class
3 Members would receive any relief beyond what the Settlement provides, the Court
4 should find the Settlement is fair, reasonable and adequate.

5 *Fourth*, Class Counsel are highly experienced in class action and labor law,
6 and based on this experience and significant work investigating the legal and
7 factual issues involved with Plaintiffs' claims, recommend the Settlement as fair,
8 reasonable and adequate. Grebow Dec. ¶14; 07-29-2013 Libicki Dec.¶21.

9 For these reasons, and as further set forth herein, the Court should enter the
10 attached proposed order granting final approval.

11 **II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND**

12 **a. Plaintiffs' Claims**

13 This is a class action against Defendants The Mill and Yurcor seeking
14 wages, penalties, equitable and injunctive relief based on Defendants' pattern and
15 practice of misclassifying their employees as independent contractors and
16 unlawfully deducting from their employees' wages Yurcor's self-styled
17 "administrative overhead costs." SAC ¶4; Grebow Dec. ¶7; 07-29-2013 Libicki
18 Dec.¶7. Plaintiffs bring this action on behalf of themselves and all other similarly
19 situated individuals Defendants employed at any time from September 14, 2009
20 through March 14, 2013 ("Settlement Class Members," collectively the
21 "Settlement Class"). SAC ¶17; Order Granting Preliminary Approval (Dkt. No.
22 50) at p. 4.

23 The Mill is a production company developing and creating visual effects for
24 advertisements, film, television, games and music videos. SAC ¶5; Grebow Dec.
25 ¶8; 07-29-2013 Libicki Dec.¶7. Yurcor is a self-styled "provider of human
26 resource services." SAC at ¶7; Grebow Dec. ¶8; 07-29-2013 Libicki Dec.¶7.
27
28

1 Yurcor provided Settlement Class Members' services to The Mill pursuant to an
2 agreement between Yurcor and The Mill resembling a labor leasing arrangement.
3 *Id.*

4 Pursuant to Defendants' agreement, The Mill located, interviewed,
5 negotiated wage rates with and entered into oral employment contracts with
6 Settlement Class Members. SAC ¶5; Grebow Dec. ¶8; 07-29-2013 Libicki Dec. ¶7.
7 The Mill then directed Settlement Class Members to contact Yurcor, who The Mill
8 falsely represented was its payroll service company, to complete their paperwork.
9 *Id.* During Settlement Class Members' employment, The Mill exercised total
10 control over the manner in which they performed their work, set their wages, hours
11 and other working terms and conditions, and was Settlement Class Members'
12 employer as a matter of law. *Id.*

13 Yurcor, with The Mill's agreement or acquiescence, exercised control over
14 the amounts actually paid to Settlement Class Members, issuing Settlement Class
15 Members' Form W-4s, I-9s and W-2s in its own name. SAC ¶7; Grebow Dec. ¶8.
16 As part of Defendants' misclassification of Settlement Class Members, Yurcor
17 held itself out as Settlement Class Members' "employer of record," and also held
18 itself out as Settlement Class Members' service provider as if Settlement Class
19 Members were independent contractors. *Id.*

20 Pursuant to this arrangement, in addition to deducting the standard employer
21 payroll deductions from Settlement Class Members' paychecks for their work at
22 The Mill, Yurcor – without Class Members' authorization – unlawfully deducted
23 from the agreed-upon wages Yurcor's "administrative overhead costs." SAC ¶¶7-
24 8; Grebow Dec. ¶8. Yurcor's "administrative overhead costs" consisted of the
25 employer share of FICA, FUTA, SUI Taxes and workers' compensation
26 deductions. *Id.* As part of this scheme to enrich themselves at Settlement Class
27 Members' expense, The Mill and Yurcor willfully misclassified Settlement Class
28

1 Members as independent contractors when they were in fact Defendants’
2 employees. SAC ¶8.

3 Plaintiffs allege Defendants’ conduct violates Cal. Labor Code §§ 201,
4 201.5, 203, 221, 223, 224, 226.8 and 2743, Cal. Bus. and Prof. Code § 17200, and
5 gives rise to a common law claim for conversion. SAC ¶9. Plaintiffs and
6 Settlement Class Members seek lost wages, waiting time and statutory penalties,
7 interest, attorney’s fees, costs, punitive damages and an order permanently
8 enjoining Defendants’ unlawful conduct. *Id.*

9 **b. Procedural History**

10 Plaintiffs commenced this action in California Superior Court on September
11 14, 2012. Dkt. 1 (Notice of Removal) at p. 14. Grebow Dec. ¶7; 07-29-2013
12 Libicki Dec.¶ 7. The action was removed to this Court on November 29, 2012. *Id.*
13 at p. 1; Grebow Dec. ¶7; 07-29-2013 Libicki Dec.¶7. Plaintiffs filed their
14 operative SAC on February 13, 2013. Dkt. No. 25; Grebow Dec. ¶7; 07-29-2013
15 Libicki Dec.¶ 7. On March 14, 2013, the parties participated in a full-day (13
16 hour) mediation and, after reaching an agreement, informed the Court of the
17 settlement of this action on March 19, 2013. *See* Dkt. No. 31 (Defendants’ Notice
18 of Settlement of Entire Action); Grebow Dec. ¶10; 07-29-2013 Libicki Dec.¶7.

19 On June 28, 2013, Plaintiffs moved the Court for preliminary approval of the
20 Settlement. Dkt. No. 40. On July 16, 2013, the Court denied Plaintiffs’ motion
21 without prejudice based on Plaintiffs’ request for attorney’s fees. Dkt. No. 43.
22 The Court reasoned it would not grant Plaintiffs’ request for fees exceeding the
23 25% of the total settlement amount that is the “benchmark” in the 9th Circuit
24 without further detail regarding Plaintiffs’ hours worked, billing rates and the
25 circumstances of the case. *Id.* at 5 (citing *Paul, Johnson, Alston & Hunt v.*
26 *Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). The Court expressly ordered Plaintiffs
27 could renew their motion. *Id.* Accordingly, Plaintiffs addressed the Court’s

1 concerns by agreeing to seek no more than the 25% “benchmark” in fees. 07-29-
2 2013 Libicki Dec. ¶¶7, 23. Thereafter, on July 30, 2013, Plaintiffs renewed their
3 motion for preliminary approval of the settlement (Dkt. No. 45). To further allay
4 any concern the Court might have with their renewed fee request, Plaintiffs filed a
5 separate Motion for Attorneys’ Fees (Dkt. No. 46) (before the due date for said
6 motion) with detailed billing reports attached thereto (Dkt. Nos. 46-02, 46-03 and
7 46-04). They did so to demonstrate that fee request should be preliminarily
8 approved, and to afford Settlement Class Members a longer opportunity to
9 consider their fee request before the objection deadline.²

10 After a hearing and after the parties updated the schedule set forth in the
11 settlement agreement to reflect the passage of time since Plaintiffs initially sought
12 preliminary approval (Dkt. Nos. 48 and 49) the Court preliminarily approved the
13 settlement on December 16, 2013. Dkt. No. 50. The Court preliminarily certified
14 the Settlement Class under Fed. R. Civ. P. 23(b)(1) and 23(b)(2) consisting of:

15
16 All individuals who on or after September 14, 2009 and at any time up
17 to and including March 14, 2013 worked or performed and completed
18 services in California for The Mill Group, Inc. (“Mill”) in the pre-
19 production, production or post-production process of motion pictures,
20 television programs advertising, game art or other visual content, as to
21 whom The Churchill Benefit Corporation dba Yurcor (“Yurcor”)

22
23
24 ² As Plaintiffs noted in their fee motion at Dkt. No. 46-1, p. 3, “while the Court
25 may preliminarily approve the fee request if and when it grants preliminary
26 approval, it should not finally rule on the instant Motion at that time. Rather,
27 Settlement Class Members should have an opportunity to object to Class Counsel’s
28 fee request, Class Counsel will respond to any such objections, and the Court may
then make a final ruling on this Motion at the same time that it rules on final

1 performed services for the Mill and/or the respective individual (for
2 example, payroll processing services, “Employer of Record” services
3 or “Yurcor’s third party payroll services program”).
4

5 The Court appointed the named Plaintiffs as class representatives for the
6 Settlement Class and appointed Schwartz, Steinsapir, Dohrmann & Sommers LLP,
7 Grebow and Rubin LLP and Stember Feinstein Doyle Payne & Kravec, LLC³ as
8 class counsel pursuant to Fed.R.Civ.P. 23(g). Dkt. No. 50 at 4. The Court
9 approved the parties’ Class Notice and directed the parties to publish and mail the
10 notice. *Id.* at 6. The Court set the Fairness Hearing for April 21, 2014, directed
11 Plaintiffs to move for final approval by March 24, 2014 and ordered any objections
12 to the settlement be served on counsel and filed with the Court no later than
13 February 28, 2014. *Id.* at 6; 9-10.

14 **c. The Parties’ Settlement**

15 The Settlement is highly favorable and provides meaningful monetary relief
16 to Settlement Class Members. Defendants will pay a total Settlement Amount of
17 \$1,350,000 for all claims. Settlement Agreement at p. 12; Grebow Dec. ¶12. After
18 case contribution awards of \$1,500 to each named Plaintiff (*Id.* at p. 13), litigation
19 costs estimated at \$10,000 (*Id.* at 22), attorneys’ fees at no greater than 25% of the
20 settlement amount (i.e., \$337,500) (*Id.*) and administration costs (estimated at
21 \$11,000), approximately \$985,500 (73% of the settlement fund) is available for
22 distribution to Settlement Class Members (including \$10,000 to the California
23
24
25

26 approval of the proposed Settlement.” Plaintiffs now ask that the proposed order
27 re fees lodged July 30, 2013 be issued.

28 ³ Now re-named Feinstein Doyle Payne & Kravec, LLC. Dkt. No. 35.

1 Labor Workforce Development Agency⁴). *See* Grebow Dec. ¶12; 07-29-2013
2 Libicki Dec.¶21).

3 Settlement Class Members will receive relief in two forms. First, Settlement
4 Class Members will receive amounts due to them as wages that Defendants
5 deducted from their pay to cover employer payroll taxes (identified in the
6 Settlement Agreement as “Disputed Payroll Deductions”), equal to approximately
7 \$437,643.73. *See* Settlement Agreement at p. 12-13; Grebow Dec. at ¶12(a); 07-
8 29-2013 Libicki Dec.¶ 21. Second, Settlement Class Members will receive a
9 waiting-time penalty calculated by dividing the remaining portion of the settlement
10 funds evenly between Settlement Class Members, currently anticipated to be
11 approximately \$2,600 per Settlement Class Member. Settlement Agreement at p.
12 13; Grebow Dec. at ¶ 12(b); 07-29-2013 Libicki Dec.¶21).

13 This Settlement is based on a full and comprehensive understanding of
14 Plaintiffs’ claims. Class Counsel reached the Settlement after a vigorous full-day,
15 arms-length mediation. Grebow Dec. ¶10; 07-29-2013 Libicki Dec.¶12. The
16 Settlement is based on Class Counsel’s extensive investigation during the
17 prosecution of this action, including both independent factual research and legal
18 research as to the strength of Plaintiffs’ claims and any applicable defenses thereto.
19 Grebow Dec. ¶6; 07-29-2013 Libicki Dec.¶10. Class Counsel considered the risks
20 of litigating the action and the likelihood of prevailing at trial. Grebow Dec. ¶14.
21 Class Counsel also considered the risks of seeking class certification which, while
22
23

24 ⁴ Payments to the California Labor and Workforce Development Agency
25 (“CLWDA”) are a common feature of class action settlements dealing with
26 California wage and hour law. *See, Morales v. Stevco, Inc.*, 1:09-CV-00704 AWI,
27 2012 WL 1790371, at *3-4 (E.D. Cal. May 16, 2012) *report and recommendation*
28 *adopted in part*, CIV-F-09-0704 AWI, 2013 WL 1222058 (E.D. Cal. Mar. 25,
2013) (granting final approval of class action settlement including payment to

1 Plaintiffs are confident their claims warrant class treatment, nevertheless carries
2 the risk the Court would deny class certification or certify a smaller class or for
3 narrower relief than Plaintiffs seek or is available through the Settlement.
4 Plaintiffs also considered the risks of proving liability, including overcoming
5 Defendants' numerous defenses to liability. Finally, Plaintiffs also considered the
6 challenges attendant in calculating and proving damages.

7 In sum, Plaintiffs entered into this settlement after considering their
8 extensive investigation, the delay involved with litigating this case on the merits,
9 the risks of seeking class certification, the risks in proving liability and damages,
10 and the likelihood of an appeal following trial. Accordingly, Plaintiffs and Class
11 Counsel recommend the Settlement as fair, reasonable and adequate. *See* Grebow
12 Dec. ¶14; 07-29-2013 Libicki Dec.¶21.

13 **d. Notice to Settlement Class Members**

14 Pursuant to the Court's Order, Plaintiffs have effected the Class Notice
15 provided for in the Settlement Agreement by mailing notice directly to Settlement
16 Class Members and by posting the notice and related documents on the law firm
17 website of Feinstein Doyle Payne & Kravec, LLC. 03-24-2013 Libicki Dec.at ¶¶5-
18 6; Morales Dec. at ¶¶2-10. This notice satisfies the requirements of Fed.R.Civ.P.
19 23 and due process because it is the best notice practicable under the
20 circumstances. *Cohorst v. BRE Properties, Inc.*, 10CV2666 JM BGS, 2012 WL
21 153754, at *2-3 (S.D. Cal. Jan. 18, 2012), *appeal dismissed* (Sept. 5, 2012)
22 (finding direct mail notice, where feasible, is the best practicable notice) (citing
23 *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 165 (1974)). To this date, no
24 Settlement Class Member has objected to the Settlement. 03-24-2013 Libicki
25 Dec.at ¶8; Morales Dec. at ¶¶11-12. To the contrary, Class Counsel have received

26
27 CLWDA); *Wietzke v. CoStar Realty Info., Inc.*, 09CV2743 MMA WVG, 2011 WL

1 phone calls and otherwise communicated with Settlement Class Members, all of
2 whom are pleased with the Settlement. *Id.* at ¶7.

3 **III. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE**
4 **AND FINAL APPROVAL SHOULD BE GRANTED**

5 The Court should approve the Settlement because it is fair, reasonable and
6 adequate. Fed.R.Civ.P. 23(e) (providing the court may approve a settlement
7 binding class members only after finding the settlement is fair, reasonable and
8 adequate). The Ninth Circuit provides district courts broad discretion in
9 determining whether to approve a proposed class settlement. *Class Plaintiffs v.*
10 *City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992). The Ninth Circuit also
11 recognizes a “strong judicial policy that favors settlements, particularly where class
12 action litigation is concerned.” *Id.* See also *Van Bronkhurst v. Safeco Corp.*, 529
13 F.2d 943, 950 (9th Cir. 1976) (“there is an overriding public interest in settling and
14 quieting litigation; [t]his is particularly true in class action suits). Accordingly, for
15 the reasons set forth herein, the Court should find the Settlement is fair, reasonable
16 and adequate and grant final approval of the Settlement.

17 **a. Legal Standard**

18 The Ninth Circuit requires district courts to consider “some or all” of eight
19 factors in determining whether a class action settlement is “fair, reasonable and
20 adequate” as required by Federal Rule of Civil Procedure 23(e)(2). *Rodriguez*, 563
21 F.3d at 963. These factors include:

- 22 (a) the strength of the plaintiff’s case;
23 (b) the risk, expense, complexity, and likely duration of further litigation;
24 (c) the risk of maintaining class action status throughout the trial;
25 (d) the amount offered in settlement;

26
27 817438, at *2 (S.D. Cal. Mar. 2, 2011) (same).

1 (e) the extent of discovery completed and the stage of the proceedings;

2 (f) the experience and views of counsel;

3 (g) the presence of a governmental participant⁵; and

4 (h) the reaction of the class members to the proposed settlement.

5 *Id. See also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

6 This list is not intended to be exhaustive, and the importance of each factor will
7 depend upon the nature of the claim, the type of relief sought, and the unique facts
8 and circumstances of each case. *In re Omnivision Techs., Inc.*, 559 F.Supp.2d
9 1036, 1040-41 (N.D. Cal. Jan. 9, 2008). As demonstrated below, under the
10 circumstances of this case, this Settlement satisfies the criteria for approval.

11 **b. Argument as to Settlement Approval**

12 ***i. The Strength of the Plaintiffs' Case***

13 The “risk of continued litigation balanced against the certainty and
14 immediacy of recovery from the Settlement” is a key factor in evaluating a
15 proposed settlement. *In re Omnivision Techs.*, 559 F.Supp.2d at 1041 (*citing*
16 *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 458 (9th Cir.
17 2000)). Here, the balance weighs in favor of approving the Settlement because the
18 Settlement provides Settlement Class Members with the certainty of prompt
19 recovery of all the unpaid wages they could obtain at trial, plus an additional
20 penalty payment. Grebow Dec. ¶14, Libicki Dec. ¶21. This balance also weighs in
21 favor of approving the Settlement because of the risk of litigation. This is a
22 complex case and there is no guarantee Plaintiffs would prevail were they to
23 litigate the case on the merits, particularly given the novelty of Defendants’
24 employment model and absence of direct precedent for Plaintiffs’ success on the

25 ⁵ Because there is no government participant to this litigation, this factor does not
26 apply. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528
27 (C.D. Cal. 2004)(“ There is no governmental participant in this Class Action. As a
28 result, this factor does not apply to the Court's analysis”).

1 particular facts at issue. Therefore, it is imprudent to continue to litigate when the
2 Settlement already secures real and meaningful monetary relief for Settlement
3 Class Members. Accordingly, this element supports approving the Settlement.

4 ***ii. The Risk, Expense, Complexity, and Likely Duration of***
5 ***Further Litigation***

6 This factor weighs in favor of approving the Settlement because litigating
7 this matter would be protracted, expensive and would have no guarantee of
8 obtaining greater relief than the Settlement provides. By its very nature as a class
9 action, litigating this matter would be complex and expensive. It is for these
10 reasons courts generally favor settling class actions. *In re Heritage Bond Litig.*,
11 No. 02-ML-1475, 2005 WL 1594403, at *6 (C.D. Cal. June 5, 2005), *citing Maley*
12 *v. Del Global Tech. Corp.*, 186 F.Supp.2d 358, 364 (S.D.N.Y. 2002); *In re*
13 *Sumitomo Cooper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y.1999) (“class action suits
14 in general have a well-deserved reputation as being most complex ...”). As courts
15 in this District recognize, “[i]n most situations, unless the settlement is clearly
16 inadequate, its acceptance and approval are preferable to lengthy and expensive
17 litigation with uncertain results.” *In re Heritage Bond Litig.*, 2005 WL 1594403, at
18 *6, *quoting Nat’l Rural Telecom. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526
19 (C.D. Cal. 2004) (*quoting* 4 A. Conte & H. Newberg, *Newberg on Class Actions*, §
20 11:50 at 155 (4th ed.2002)(internal quotations omitted).

21 Absent settlement, the parties will expend significant time and resources
22 litigating this matter, engaging in merits discovery, briefing and arguing class
23 certification and dispositive motions, trying the case, and waiting for the Ninth
24 Circuit to resolve any appeal.⁶ Further litigation would expend the parties’ and the
25

26
27 ⁶ See *ASIS Internet Servs. v. Member Source Media, LLC*, 2008 WL 4164822, at
28 *2 (N.D. Cal. Sept. 8, 2008) (“The Administrative Office of the U.S. Courts

1 Court's time and resources with no guarantee that Plaintiffs would achieve any
2 recovery, while Settlement Class Members would only stand to gain additional
3 fees and penalties on top of the unpaid wages they will recover under the
4 Settlement. Grebow Dec. ¶14; 07-29-2013 Libicki Dec.¶21. Accordingly, this
5 factor weighs strongly in favor of Settlement approval.

6 ***iii. The Risk of Maintaining Class Action Status Throughout the***
7 ***Trial***

8 This factor weighs in favor of settlement because, while Defendants do not
9 oppose certifying the Settlement Class, there is every indication Defendants would
10 vigorously contest certifying a litigation class. Although Plaintiffs and Class
11 Counsel believe that the putative class warrants certification, they also recognize
12 the risk the Court denies certification or certifies a narrower class than the
13 Settlement Class. Additionally, regardless of whether the Court grants or denies a
14 contested motion for class certification, either party would have the right to
15 petition the Ninth Circuit to review the decision pursuant to Fed.R.Civ.P. 23(f),
16 increasing the risk that litigation would cause the parties to expend further time and
17 resources. Accordingly, the risks involved in seeking to certify and maintain this
18 action as a class action throughout trial weigh in favor of approving the Settlement.
19 *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 460 (S.D.N.Y. 2004)
20 (concluding settlement was appropriate because defendants may contest class
21 certification “thereby creating appreciable risk to the class members’ potential for
22 recovery”).

23 ***iv. The Amount Offered in Settlement***

24 This factor weighs in favor of approving the Settlement because each
25 Settlement Class Member is eligible to receive the full amount Defendants
26

27 indicates that the median time for an appeal in the Ninth Circuit to be resolved is
28

1 unlawfully deducted from their wages, together with an additional penalty
2 payment. Grebow Dec. ¶14; 07-29-2013 Libicki Dec.¶21. The most Settlement
3 Class Members would gain through litigation are additional penalty payments
4 since the Settlement already returns Settlement Class Members' out-of-pocket
5 losses. *Id.* However, Fed.R.Civ.P. 23(e) does not require Settlement Class
6 Members receive *all* the relief they could potentially recover in order for the
7 settlement to be fair, reasonable and adequate. This is because, as the Ninth
8 Circuit has recognized, settlement by its nature is a compromise and therefore a
9 settlement need not reflect the best possible result in the litigation, but need only be
10 reasonable. *Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 624-25 (9th
11 Cir. 1982) (“[T]he very essence of a settlement is compromise, a yielding of
12 absolutes and an abandoning of highest hopes.... [Accordingly,] [t]he proposed
13 settlement is not to be judged against a hypothetical or speculative measure of what
14 might have been achieved....”) (internal citations omitted). The Settlement satisfies
15 this standard because it squarely addresses Settlement Class Members' injuries
16 through meaningful monetary relief.

17 ***v. The Extent of Discovery Completed and the Stage of the***
18 ***Proceedings***

19 This factor weighs in favor of approving the settlement because, although
20 the parties settled early in the litigation, Class Counsel conducted a thorough legal
21 and factual investigation enabling them to properly evaluate the Settlement.
22 Formal discovery is not a prerequisite for class action settlements as long as
23 counsel for both parties possess sufficient information to properly evaluate the
24 proposed settlement. *Glass v. UBS Financial Services, Inc.*, No. 06-CV-4068,
25 2007 WL 221862, at *4 (N.D. Cal. Jan. 26, 2007), citing *In re Mago Fin. Corp.*

26
27 17.4 months”).

1 *Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000). Class Counsel conducted an
2 extensive investigation prior to commencing this action and continued
3 investigation and research through the mediation, enabling them to properly and
4 fairly assess the merits of the proposed settlement agreement. 07-29-2013 Libicki
5 Dec. ¶¶6, 9-12. Accordingly, this factor weighs in favor of approving the
6 settlement.

7 ***vi. The Experience and Views of Counsel;***

8 Class Counsel recommend approving the settlement, and respectfully assert
9 the Court should give this recommendation weight based on their extensive and
10 lengthy experience as class action attorneys litigating claims such as those at issue
11 here. *See* Grebow Dec. ¶14; 07-29-2013 Libicki Dec. ¶21; Exhibits B - E to part 3
12 of the Grebow Dec. (Dkt. No. 45-04) (“Firm Resumes”). Courts afford a
13 presumption of reasonableness to recommendations by plaintiffs’ counsel
14 regarding a proposed settlement. *In re Omnivision Techs.*, 559 F. Supp. 2d at 1043
15 (citing *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)).
16 Furthermore, when “[b]oth parties are represented by experienced counsel [] their
17 mutual desire to adopt the terms of the proposed settlement, while not conclusive is
18 entitled to a great deal of weight.” *In re Immune Response Sec. Litig.*, 497 F.
19 Supp.2d 1166, 1174 (S.D. Cal. 2007), citing *Williams v. Vukovich*, 720 F.2d 909,
20 922-23 (6th Cir. 1983). As described in the Firm Resumes, Feinstein Doyle Payne
21 & Kravec, LLC (“FDPK”) has a prominent national class action practice, and has
22 represented employees in numerous class actions around the country, including in
23 federal court in California. Firm Resumes at p. 17. Arthur Grebow of Grebow &
24 Rubin, LLP has over 45 years of experience as a litigator in State and Federal
25 Courts and has participated in the prosecution and defense of numerous class
26 actions. *Id.* at p. 13. Schwartz, Steinsapir, Dohrmann & Sommers, LLP has
27 extensive experience in the practice of labor and employment law and has served

1 as trial counsel in several class actions. *Id.* at p. 3. Accordingly, the Court should
2 give significant weight to Class Counsel's recommendation and find the settlement
3 is fair, reasonable and adequate.

4 ***vii. Settlement Class Members' Positive Response and the***
5 ***Absence of Objections Support Approving the Settlement***

6 This factor weighs heavily in favor of approval because the reaction from
7 Settlement Class Members to the Settlement has been exclusively positive. In
8 accordance with the notice plan approved by the Court (Dkt. No. 50 at p. 6), notice
9 was mailed directly to Settlement Class Members and was published on the
10 website of Feinstein Doyle Payne & Kravec, LLC. Libicki Dec. at ¶¶5-6.
11 Significantly, no Settlement Class Member objected to the Settlement and the
12 February 28, 2014 deadline to object has passed. Libicki Dec. at ¶8. Accordingly,
13 this factor weighs heavily in favor of approving the Settlement. *See Nat'l Rural*
14 *Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal.
15 2004) ("It is established that the absence of a large number of objections to a
16 proposed class action settlement raises a strong presumption that the terms of a
17 proposed class settlement action are favorable to the class members") (citing
18 cases).

19 **c. Settlement Class Members' Reaction Supports Plaintiffs' Motion**
20 **for Attorney's Fees**

21 As set forth above, Plaintiffs separately filed their Motion for an Award of
22 Attorney's Fees, Reimbursement of Expenses, and Case Contribution Awards
23 (Dkt. No. 46) together with declarations attaching detailed billing records in
24 support of their fee request (Dkt. Nos. 46-02, 46-03 and 46-04). Plaintiffs moved
25 for fees separately in order to give Settlement Class Members the opportunity to
26 object to the fee request. Dkt. No. 46 at p. 2. Since no Settlement Class Member
27 objected to Plaintiffs' fee request, Plaintiffs respectfully request the Court grant the

1 motion for the reasons detailed therein and in the declarations and attachments
2 thereto. *See* 03-24-2013 Libicki Dec. ¶8; Morales Dec. at ¶11. Accordingly,
3 Plaintiffs request that the proposed order re fees lodged July 30, 2013, and refiled
4 concurrently herewith for the Court's convenience be issued.

5 **IV. CONCLUSION**

6 For the reasons set forth herein, this Class meets all prerequisites for
7 certification and the Settlement merits final approval. The circumstances have not
8 changed since the Court's Preliminary Approval Order, and no objection has been
9 filed as to the certification of such a Class or approval of the Settlement. As such,
10 Plaintiff respectfully requests that the Settlement Class should now be finally
11 certified under Rule 23 and the Settlement (including the fee award) be approved
12 in all respects.

13
14 DATED: March 24, 2014

Respectfully submitted,

15
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